

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK LAWRENCE BARNES,

Defendant-Appellant.

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UNPUBLISHED

October 2, 2007

No. 271155

Wayne Circuit Court

LC No. 05-012697-01

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and sentenced to four to ten years' imprisonment.<sup>1</sup> He appeals as of right. We affirm.

**I. FACTS**

Defendant's conviction arises out of a stabbing incident that occurred during the early morning hours of November 23, 2005. The victim, Adam Gibbs, was cut on the face and received stab wounds to his liver and lung. Before the incident, the victim was celebrating his brother, Jake Gibbs's, release from prison with a group of people that included Jake, Tracey Thayer, and Priscilla Cremeans. The group encountered defendant at Thayer's apartment, where an argument erupted between defendant and Jake. Thayer testified that defendant was her roommate's former live-in boyfriend. The testimony conflicted with regard to what occurred after Jake and defendant began arguing. Although the victim remembered little, except that he had a fistfight with defendant in the kitchen, other witnesses indicated that Cremeans pushed Jake into the hallway before the fight because Jake was on parole. Cremeans testified that she saw defendant pick up a knife and stab the victim in his right side after she returned to the kitchen. Defendant, who presented a claim of self-defense, testified that the victim interceded in his argument with Jake by initiating a fistfight and that Jake tried to stab defendant with a knife

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<sup>1</sup> The original judgment of sentence indicated that defendant received a maximum sentence of 15 years' imprisonment. While this appeal was pending, the trial court entered an order *nunc pro tunc* changing the maximum sentence to ten years.

during the fight. Defendant testified that he tried to avoid being stabbed by Jake and that his finger was cut while tussling with Jake over the knife. Defendant denied stabbing the victim.

## II. PROSECUTORIAL MISCONDUCT

On appeal, defendant argues that the prosecutor engaged in misconduct by making prejudicial remarks and asking prejudicial questions. We disagree.

### A. Standard of Review

Generally, we review claims of prosecutorial misconduct de novo to determine whether a defendant was denied a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). However, because defendant failed to preserve this issue for appellate review by objecting to the prosecutor's alleged misconduct, our review is limited to plain error affecting his substantial rights. *Id.* at 451. "When reviewing a claim of prosecutorial misconduct, we examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *Id.*

### B. Analysis

Opening statement is the time for the prosecutor to make a full and fair presentation of his or her case and the facts the prosecutor intends to prove. MCR 6.414(C). The prosecutor's remark that "[t]his case is about gang banging" does not contravene this rule. The prosecutor later explained that he would be presenting evidence that defendant approached Jake in the apartment because, as a member of a gang, defendant did not like the way that Jake was wearing his hat turned sideways on his head.

In his case-in-chief, the prosecutor offered testimony in support of his claim that gang-related concerns about how Jake wore his hat caused defendant to become angry with Jake. Jake testified that defendant told him that he was in a gang and that he wanted the hat turned so that it was straight. Defendant's own testimony indicated that he did not like the way that Jake wore his hat, and he knew that wearing a hat to the side had a gang-related meaning. At one point, defendant even testified that his gang's name was tattooed on his neck, but then he attempted to change his testimony by offering a non-gang purpose for the tattoo. Further, defendant attempted to discount the significance of his statement to Jake regarding the hat by testifying that Jake offended him in other ways, such as being drunk and touching his girlfriend's belongings.

Examined in context, the prosecutor's remarks in closing argument—that this case was about a "gang banger" and, specifically, that defendant became angry over Jake's hat for gang-related reasons—were not plainly improper. The prosecutor was "free to argue the evidence and all reasonable inferences arising from it as they related to [his] theory of the case." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Ultimately, the prosecutor asked the jury to assess defendant's credibility in light of the knowledge regarding gangs that he demonstrated in his testimony. Unlike *People v Jones*, 48 Mich App 334, 343; 210 NW2d 396 (1973), the record in this case does not indicate that the prosecutor sought a conviction by innuendo or by improperly attempting to inflame the jury. We, therefore, find no plain error affecting defendant's substantial rights in the prosecutor's opening statement or closing argument. *Cox*, *supra* at 451.

With regard to defendant's claim that the prosecutor improperly questioned Cremeans in a manner to suggest that he was dangerous, the prosecutor was entitled to attempt to introduce evidence that he legitimately believed would be accepted by the trial court, so long as the attempt did not prejudice defendant. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

The prosecutor elicited from Cremeans, without objection, that she kept rubbing her hands because she was nervous, upset, and did not really want to testify. Upon further inquiry regarding whether Cremeans was scared, the trial court sustained defendant's objection to Cremeans's affirmative answer, on the ground that the question was leading, and the trial court instructed the jury to disregard the testimony. It is not apparent that the prosecutor acted in bad faith in making this inquiry. Although the trial court found the use of a leading question to be improper, the reason for a witness's demeanor while testifying, like a witness's motive for testifying, is an appropriate subject for questioning because it can provide clues to the fact-finder regarding whether the witness is telling the truth. See *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998) (demeanor), and *People v Layher*, 464 Mich 756, 765-767; 631 NW2d 281 (2001) (motive). Contrary to defendant's argument on appeal, the prosecutor did not suggest that defendant was dangerous. Moreover, the purpose of requiring a timely objection at trial is to give the trial court an opportunity to correct the error. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). There is no indication in the record that the jury was not able to follow the trial court's instruction to disregard the testimony. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Therefore, defendant's right to a fair trial was not violated by the prosecutor's questioning of Cremeans.

Finally, we reject defendant's claim that the prosecutor's questioning of Thayer deprived him of a fair trial. When the prosecutor asked Thayer if she went to Adam's apartment to get away from defendant, the trial court sustained defendant's objection. The trial court later instructed the jury that the "lawyers' questions to witnesses are also not evidence." Again, the jury is presumed to have followed the trial court's instruction. *Abraham, supra* at 279.

The prosecutor's subsequent redirect examination of Thayer, without objection, was not plainly improper. It is apparent from the record that Thayer's credibility was a matter of concern to both parties, given Thayer's testimony that she had little memory regarding the stabbing incident, that she could not remember providing a written statement to the police, and that the information in her written statement could be false. Defense counsel cross-examined Thayer regarding her possible motives for testifying as she did. The inquiries included whether she had any romantic relationship with the victim and whether she wanted to protect the victim, or Jake, from getting into trouble. The prosecutor's response on redirect examination, regarding whether Thayer was trying to protect anyone and whether defendant was the father of her baby, was not plainly improper. Any party may attack the credibility of a witness. MRE 607. Moreover, the jury is presumed to have followed the trial court's later instruction that the lawyers' questions to witnesses should only be considered "as they give meaning to the witnesses answers." Therefore, defendant has not established any plain error, let alone an error determinative of the outcome of the case. *Cox, supra* at 451.

### III. SUFFICIENCY OF THE EVIDENCE

Next, defendant argues that the evidence was insufficient to establish that he did not act in lawful self-defense. We disagree.

#### A. Standard of Review

“[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

#### B. Analysis

The elements of an assault with intent to do great body harm less than murder are “(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.” *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). If there is evidence of self-defense, the prosecutor must disprove self-defense beyond a reasonable doubt. *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005). To establish self-defense, the defendant must honestly and reasonably believe that his life is in imminent danger or that he faces a threat of serious bodily harm. *Id.* In general, a defendant is not entitled to the defense if he was the aggressor or used more force than necessary to defend himself. *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993).

Here, there was testimony that the victim received multiple stab wounds and Cremeans’s testimony, if believed, supports an inference that the victim was unarmed and engaged only in a fistfight when defendant picked up the knife and stabbed him in the side. Although defendant testified that he did not possess a knife and contradicted other testimony presented by the prosecutor, a reviewing court must make credibility choices in support of the jury’s verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Contrary to defendant’s claim on appeal, there is no basis in the record for taking the credibility determination away from the jury. See *Lemmon*, *supra* at 643-644 (even if testimony directly conflicts and has been impeached, credibility is for the jury to decide unless, as a matter of law, the testimony so impeached was deprived of all probative value or the jury could not believe it). Viewed in a light most favorable to the prosecution, the evidence was sufficient to disprove any claim of lawful self-defense to the charge that defendant assaulted the victim with an intent to do great bodily harm less than murder.

Affirmed.

/s/ Bill Schuette  
/s/ Joel P. Hoekstra  
/s/ Patrick M. Meter